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No. 98-535

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

TEXAS EDUCATION AGENCY,
Petitioner,

v.

KAREN HANSEN MESSER,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. This Court Has Jurisdiction Over The Petition For Certiorari.

Respondent Messer argues in her Brief in Opposition at 2-3 that because the mandate has been returned to the district court, the case is no longer "in the court of appeals" for purposes of 28 U.S.C. § 1254(1), and therefore "is not a case . . . subject to review by writ of certiorari . . ." That argument is specious. "[I]t is clear that issuance of the court of appeals mandate does not defeat the right to petition for certiorari on the ground that the case is no longer in the court of appeals." 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION 2d § 4036 at 19 & n. 26 (1988) (citing cases). *See also, United States v. Villamonte-Marquez*, 462 U.S. 579, 580 n.2, 103 S. Ct. 2573, 2575 n.2 (1983).

II. Defendants Meno And Moses Are Before The Court.

Messer argues that because Defendants Lionel R. Meno (former Commissioner of the Texas Education Agency) and Mike Moses (the current Commissioner) are not listed by name, in addition to that of Petitioner TEA, "the opinion and judgment of the Fifth Circuit is now final and nonappealable as to both Meno and Moses." Brief in Opposition at i. This argument is frivolous. Dr. Meno and Dr. Moses are defendants only in their official capacities.[1] In that capacity, they assume the identity of TEA. *Hafer v. Melo*, 502 U.S. 21, 26, 112 S.Ct. 358, 362 (1991). Accordingly, they are before the Court by virtue of naming TEA. Indeed, because this suit is now an action solely under Title VII of the Civil Rights Act of 1964, which creates a cause of action only against the "employer," 42 U.S.C. § 2000e-(b),-(f)(1), it is redundant to name Meno and Moses as defendants.

III. The Fifth Circuit Has Confused Statutory And Constitutional Standards For Affirmative Action.

The Respondent's Brief in Opposition highlights a salient feature of this case, which calls for Supreme Court review. The additional statutory provisions Messer says the Petition overlooked are all sections of Title VII and of EEOC regulations implementing that statute. Brief in Opposition at 4-7. That exposition serves only to underline the point made in the Petition at 14, that by the time Messer's case reached the Fifth Circuit, she asserted claims solely under Title VII, not under the Equal Protection Clause of the Fourteenth Amendment.

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[1] Initially, Messer sued Dr. Meno also in his individual capacity, for purposes of her damage claims under 42 U.S.C. § 1981 and 1983. However, early in the litigation she dismissed with prejudice her claims against Dr. Meno individually, and did not appeal the summary judgment as to her § 1981 and § 1983 claims.

This case thus offers the Court the opportunity to clarify an issue that has become confused at the circuit level: the relationship between Title VII and constitutional equal protection with respect to affirmative action by a public agency employer. This Court last spoke on the subject in *Johnson v. Transportation Agency*, 480 U.S. 616, 627 n.6, 107 S. Ct. 1442, 1450 n.6 (1987), as discussed in the Petition at 15-16.

Most circuits to consider the question since then have understood *Johnson* to have held that Title VII standards for affirmative action are distinct from and less stringent than those under equal protection analysis. *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) *cert. denied*, __ U.S. __, 118 S.Ct. 1839 (1998); *Edwards v. City of Houston*, 37 F.3d 1097, 1110 n.9 (5th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1536 (11th Cir. 1994); *Brunet v. City of Columbus*, 1 F.3d 390, 405 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164, 114 S. Ct. 1190 (1994); *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990) ("The level of proof necessary to justify the consideration of race in an employer's hiring practices, however, differs depending on whether the challenge invokes the equal protection clause or Title VII," with review under the former "made under the more demanding 'strict scrutiny' analysis").

But more recent decisions of this Court have left courts of appeals in disarray as to how to apply *Johnson*. *See, Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 690 (4th Cir. 1996) (MICHAEL, J., dessenting from en banc decision) (the majority's and concurrence's "reliance on the Supreme Court's decisions in *Adarand Constructors, Inc. v. Pena*, [515] U.S. [200], 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989), is a red herring [because] plaintiffs brought their complaint under Title VII and the Equal Pay Act, not the Equal Protection Clause") (record citation omitted); *City of Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995) (noting that,

in light of *Johnson*, "the applicability of that [Title VII] principle to the [Title VI] case under advisement is not at all clear," but assuming that Title VII standards apply). In *Birmingham, supra*, the Eleventh Circuit "recognized the struggle that district courts face in extracting guidance from the various multi-part Supreme Court opinions on the constitutionality of government-sponsored affirmative action programs developed in various contexts." *Id.*, 20 F.3d at 1534. That difficulty is exhibited in *Taxman v. Board of Education*, 91 F.3d 1547, 1559-1560 (3rd Cir. 1996) (en banc), *cert. dism'd*, __ U.S. __, 118 S.Ct. 595 (1997). *But see*, 91 F.3d at 1568 (SLOVITER, C.J., dissenting) ("although the School Board is a public employer, . . . because we are presented with no constitutional claim [, t]herefore, we must measure the Board's actions under the restraints imposed by Title VII rather than the more demanding ones imposed on government action by the Equal Protection Clause").

As previously noted, in the instant case the Fifth Circuit ignored *Johnson* altogether and relied entirely on its own equal protection jurisprudence to conclude that TEA's affirmative action efforts created a fact issue for purposes of Messer's Title VII claim. Petition at 14-17. Completing the logical circle, the Fifth Circuit in subsequent decisions has cited its *Messer* opinion as authority on constitutional equal protection issues. *Lesage v. State of Texas*, 158 F.3d 213, 216-217, 221 (5th Cir. 1998); *Harris v. City of Houston*, 151 F.3d 186, 196 (5th Cir. 1998).

If *Johnson v. Transportation Agency* is no longer good law – *cf., Taxman*, 84 F.3d at 683 (WILKINS, J., concurring) – this Court should say so. If, however, that decision is still viable, the Court should resolve the disparity of interpretations among the circuits. In any event, the Court should grant *certiorari* to clarify the law on this issue.

IV. The Fifth Circuit Has In Effect Created A Double Standard For Summary Judgment On Title VII Disparate Treatment Claims.

Subsequent rulings by the Fifth Circuit have made it even more apparent that, as discussed in the Petition at 7-13, the *Messer v. Meno* decision imposes a lighter burden on white Title VII plaintiffs complaining of affirmative action than on minority plaintiffs alleging discrimination.

In *Lesage*, a white plaintiff sued under Title VI and equal protection, asserting that the University of Texas racially discriminated against him when it denied him admission to a doctoral program. *Id.* at 158 F.3d 215. Relying on its *Messer v. Meno* decision, the Fifth Circuit held that, although the plaintiff did not controvert the defendants' proof that he did not qualify for ultimate admission into the program, nevertheless a fact issue of discrimination was created by testimony that members of the admissions committee were "interested in qualified people of Hispanic and African American background," were "very sensitive to those issues and very concerned to get qualified minority students." *Id.* at 220. By contrast, in *Johnson*, this Court approved a program which "authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.*, 480 U.S. at 638, 107 S. Ct. at 1455. *See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 n.10, 109 S. Ct. 1786, 1788 n. 10 (1989) (Title VII does not authorize relief for systemic discrimination to individuals as to whom the systemic discrimination has had no effect).

Nobody who is familiar with recent trends in Title VII litigation can credibly contend that a minority plaintiff could overcome summary judgment on facts equivalent to those found sufficient in *Lesage* – i.e., that the employer was "interested" in attracting qualified white employees along with minorities.

Certiorari should be granted to examine the legitimacy and validity of the Fifth Circuit's approach to Title VII.

Respectfully submitted,

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